

No. _____

In the
Supreme Court of the United States

FRANCISCO FELIX,
Petitioner,
v.

UNITED STATES OF
AMERICA, *Respondent.*

On Petition For A Writ Of
Certiorari To The United States
Court Of Appeals For The Ninth
Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the wiretap application failed to satisfy the requisite Fourth Amendment standard that requires exigent circumstances for an application to be approved?

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OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced as Appendix A.

JURISDICTION

The court of appeals entered judgment on January 15, 2021. App. A. It denied a petition for rehearing on March 2, 2021. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A jury convicted Petitioner on several drug trafficking counts, and he was sentenced to 20 years in prison. The strength of the government's case was premised on wiretaps. Specifically, after ten months of successful investigation into alleged drug trafficking on ranches in the Eastern District of California including the extensive use of at least two confidential informants, the government sought wiretaps for two phones, including one belonging to Petitioner to augment their investigation.

Despite acknowledging the success of their efforts and what it would take to continue using these successful traditional techniques, the government claimed it was necessary to get a wiretap authorization because there was “no guarantee” the investigation would succeed without the wiretaps.

Petitioner moved to suppress the fruits of the wiretap application, claiming that the government failed to prove their necessity. Pressing the lack of necessity presented in the application, Petitioner argued that the application actually suggested the opposite, i.e., that further use of at least one of the government’s informants would lead to the sort of evidence sought in through the use of wiretaps. The court took the issue under submission and then rendered a written order denying the motion.

In the order, the court ruled that the government’s affidavit “makes clear that wiretaps were necessary” to achieve all the goals of the investigation. It cited the government’s assertion that there was “no guarantee” that additional higher-level targets would be introduced to the government’s informant. With respect to the continued use of informants, the court concluded, without citing specifics or making any case-specific findings, that “the government demonstrated that it was unlikely [the informant] would be able to secure any higher level information regarding suppliers or the handling of assets.” Referencing the government’s concerns about the costs of using its informant to continue drug purchases and thereby further infiltrate the organization, the court made no specific findings of fact on this point about what the costs would be or how they balanced with the costs of pursuing a wiretap. Rather, the

court concluded that “it was not just the cost of further controlled buys that created the necessity.” Instead, the court found first that “the effectiveness of the informants was limited due to the informants’ fear for their lives,” despite no allegation that this particularly successful informant feared for his life or even general safety. The district court concluded by stating that the informants’ effectiveness was also limited by “their inability to secure the trust necessary to identify all the members of the conspiracy.” In making this final finding, the court didn’t explain how it was consistent with the government’s aversion that its informant could continue to do so if he kept purchasing drugs from Petitioner.

Petitioner’s trial lasted four days with the jury returning a guilty verdict for all counts on the fourth day.

The government’s case relied heavily on the wiretaps. Indeed, in its opening statement, the government made clear that it would shield its informant from scrutiny when it announced that it wouldn’t call him.

Instead, the government relied primarily on the testimony of eight law enforcement officers, an irrigation worker, one co-defendant and an unindicted co-conspirator. They played the intercepted calls over the course of the trial, and emphasized in closing argument the centrality of the wiretap evidence to its case.

The jury retired to deliberate for less than two hours and returned a verdict of guilty on all counts.

On appeal, the Ninth Circuit affirmed the denial of Petitioner’s motion to suppress the wiretap evidence. Appx. A at 4. Regarding Petitioner’s constitutional challenge to the necessity requirement, the court relied in part on its decision in *United States v. Forrester*, 616 F.3d 929, 944-45 (9th Cir. 2010), that ruled against a similar challenge. Petitioner sought rehearing, which was denied. Appx. B. This petition follows.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit’s affirmance in this case continues a long line of cases of that have watered down the statutory necessity requirement to nothing more than a puddle in the way of the government’s drive to skip the hard work of traditional investigative techniques and move onto the extremely helpful, but extremely intrusive tool that is a wiretap.

In *Berger v. State of New York*, 388 U.S. 41 (1967), the Supreme Court struck down New York’s wiretapping statute. In doing so, the Court explained that the state wiretapping scheme did not require “any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.” *Id.* at 60. Typically, exigent circumstances “include the need to protect an officer or the public from danger, the need to avoid the imminent destruction of evidence, when entry in ‘hot pursuit’ is

necessary to prevent a criminal suspect's escape, and to respond to fires or other emergencies." *United States v. Brooks*, 367 F.3d 1128, 1133 n.5 (9th Cir. 2004) (citations omitted).

When Congress enacted Title III, it attempted to construct a wiretapping provision that would meet the constitutional requirements of *Berger*, and therefore the courts have generally rejected broad facial challenges to the statute. *See United States v. Turner*, 528 F.2d 143, 159 (9th Cir. 1975). Petitioner here has not made such a broad, facial attack. Instead, he is claiming that two particular portions of Title III run afoul of the constitutional requirements in *Berger* and that therefore, as applied in this case, the Title III authorizations were unconstitutional.

Specifically, in an apparent attempt to comply with *Berger*'s exigent circumstances requirement, Congress enacted a "necessity" requirement in Title III. *See, e.g., United States v. Gonzalez*, Inc., 412 F.3d 1102, 1112 (9th Cir. 2005); *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001). Under the so-called "necessity" requirement, the government must show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c); *see also* 18 U.S.C. § 2518(1)(c). Thus, "the government may establish necessity for a wiretap by any of the three, alternative methods. The government may show that traditional investigative procedures (1) have been tried and failed; (2) reasonably appear unlikely to succeed if tried; or (3) are too dangerous to try." *Gonzalez*, Inc., 412 F.3d at 1112.

Petitioner contends that the first and second methods of establishing “necessity” do not satisfy *Berger*’s exigent circumstances requirement. As stated above, exigent circumstances generally involve some danger or need for imminent action. *See Brooks*, 367 F.3d at 1133 n.5. Put simply, showing that normal investigative techniques do not appear likely to succeed if tried does not constitute an exigent circumstance, nor does the fact that traditional investigative procedures have been tried and failed. The enormous expansion in the use of wiretaps over the past five decades is a result of Title III’s watered-down version of the exigent circumstances requirement. The Court should strike down the first and second “necessity” prongs because they fail to satisfy the Fourth Amendment exigent circumstance requirement set forth in *Burger* and thereby restore wiretapping to its appropriate use as a rare investigative method.

As a result, in order to establish the required exigent circumstances under the Fourth Amendment, the government must satisfy the third “necessity” prong – the danger prong. In this case, as discussed *supra*, the wiretap application did not make a sufficient showing of danger. Consequently, the application is deficient, and suppression is required under this theory as well. *See* 18 U.S.C. § 2515; 18 U.S.C. § 2518(10)(a).

Petitioner acknowledges that this argument has been rejected by the Ninth Circuit in *United States v. Forrester*, 616 F.3d 929 (9th Cir. 2010). And he is aware of no circuit that has considered this argument and ruled to the contrary. But it is a question of exceptional importance, one that implicates the lower courts’ decisions to authorize

such an intrusive investigative tool virtually every time the government seeks its use. As this Court has said, “Wiretaps are not to be routinely employed as the initial step in criminal investigation.” *United States v. Giordano*, 416 U.S. 505, 515 (1974). But the reasoning of *Forrester* and the consequential lack of limitations on what constitutes necessity is a question that this Court needs to address in order to restore the constitutional balance this Court envisioned in *Berger*.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: June 1, 2021

Respectfully submitted,



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